TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT TERRITORY OF HAWAII, ET AL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED NOVEMBER 28, 1904.

(19,542.)

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1 In the Supreme Court of the Territory of Hawaii.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

($2. stamps.)

Writ of Prohibition.

The Territory of Hawaii to the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, and J. S. Low, next friend of Annie T. K. Parker, a minor, Greeting:

Upon reading the annexed petition of A. W. Carter, guardian of the property of Annie T. K. Parker, a minor and it appearing to me that a writ of prohibition should issue as prayed for;

Now therefore you, the said Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, are hereby prohibited from taking further cognizance of the "Amended motion and petition of Annie Thelma K. Parker by her next friend J. S. Low to remove A. W. Carter as guardian," and from proceeding further therein; and you the said J. S. Low next friend of Annie T. K. Parker, a minor are prohibited from proceeding further in said amended motion and petition until further order of the supreme court of the Territory of Hawaii.

And you and each of you are further commanded to appear and be before the supreme court of the Territory of Hawaii upon
2 Monday, the 3rd day of October, A. D. 1904 to show cause, if any you have, why this writ should not be made perpetual.

Witness the Honorable Walter F. Frear, chief justice of the supreme court of the Territory of Hawaii this 7th day of September, A. D. 1904.

[SEAL.] (Signed) GEORGE LUCAS, *Clerk.*

3 Let a writ issue as prayed for herein returnable before the supreme court on Monday October 3, 1904.

(S'g'd) W. F. FREAR,
Chief Justice Supreme Court.

Honolulu, T. H., Sept. 7, 1904.

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

($2. stamps.)

Petition for a Writ of Prohibition.

To the Honorable W. F. Frear, chief justice of the supreme court of the Territory of Hawaii:

Your petitioner, Alfred W. Carter, guardian of the property of Annie Thelma K. Parker, respectfully represents:

1. That petitioner is the guardian of the property of Annie T. K. Parker, a minor, petitioner having been duly appointed as such guardian by the Honorable W. L. Stanley, then second judge of the circuit court of the first circuit, Territory of Hawaii, on the 29th day of September, A. D. 1899, and at all times hereafter mentioned has been and now is the duly qualified and acting guardian for said minor as aforesaid;

2. That heretofore, to-wit, on the 27th day of July, 1904, there was filed before a circuit judge of the first judicial circuit, Territory of Hawaii, at chambers, by J. S. Low as next friend of said Annie T. K. Parker an "Amended motion and petition of Annie Thelma K. Parker by her next friend J. S. Low to remove A. W. Carter as guardian," a copy of which amended motion and petition is hereto attached, marked "Exhibit A" and made a part hereof;

3. That said amended motion and petition, though purporting to be entitled—"In the circuit court of the first judicial circuit,
4 Territory of Hawaii. In probate, at chambers" was in fact filed before a circuit judge of the first judicial circuit, sitting at chambers, to-wit, the Honorable George D. Gear, second judge of the circuit court of the first circuit, and said Honorable George D. Gear, second judge as aforesaid, sitting at chambers, as aforesaid, has taken cognizance and jurisdiction of said amended motion and petition and is proceeding in a summary manner, at chambers, to hear and determine the issues thereby presented, and has made and filed certain interlocutory decisions therein, which decisions are entitled and endorsed "Before a circuit judge of the first circuit, at chambers," and is about to proceed to a hearing of said cause upon its merits;

4. That your petitioner duly objected to the jurisdiction of said Honorable George D. Gear, second judge as aforesaid, sitting at chambers as aforesaid, upon the grounds hereafter stated, but that said objection was over-ruled by said Honorable George D. Gear in

a decision filed the 2nd day of September, 1904, a copy of which is hereto attached, marked "Exhibit B" and made a part hereof;

5. That there is no action, cause or matter pending in the circuit court of the first judicial circuit, Territory of Hawaii, or in any court of the Territory of Hawaii, or in any court elsewhere, to which said amended motion and petition is incidental or ancillary, but that said Honorable George D. Gear, second judge as aforesaid, sitting at chambers as aforesaid, in hearing and determining the matters and things alleged in said amended motion and petition is hearing and determining questions of a judicial nature entirely independent of any cause pending in any court of the Territory of Hawaii or in any court elsewhere;

5 6. That said Honorable George D. Gear, second judge as aforesaid, sitting at chambers as aforesaid, has taken cognizance and jurisdiction of said cause, and is exercising authority over the same under and by virtue of act 16 of the Session Laws of the Territory of Hawaii for 1903 and section 11 of act 32 of the Session Laws of the Territory of Hawaii for 1903, which statutes purport to confer upon the judges of the several circuit courts, at chambers, within their respective jurisdictions, jurisdiction of matters of the nature of said amended motion and petition and of other judicial matters as therein more fully set forth;

7. That said statutes and each of them and all statutes of the Territory of Hawaii purporting to confer judicial power and authority upon circuit judges at chambers to hear and determine judicial matters not incident or ancillary to any cause pending in some court, are and each of them is null and void, being in conflict with article 3, section 1 of the Constitution of the United States providing that "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish:"

8. That said statutes and each of them and all statutes of the Territory of Hawaii purporting to confer judicial power and authority upon circuit judges at chambers to hear and determine judicial matters not incident or ancillary to any cause pending in some court, are and each of them is null and void, being in conflict with section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30th, 1900, and reading as follows: "Section 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts and in such inferior courts as the legislature may from time to time

6 establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force, except as herein otherwise provided;"

9. That said Honorable George D. Gear, second judge of the circuit court of the first circuit at chambers, has no jurisdiction over the subject matter of said amended motion and petition, nor over any of

the matters and things therein alleged; nor any authority under the law to grant any of the relief therein prayed for;

10. That said J. S. Low in prosecuting said amended motion and petition before a tribunal without jurisdiction thereof is putting your petitioner and the estate of said minor Annie T. K. Parker, to great and needless expense, and is causing your petitioner and the said estate great and irreparable injury, for which there is no plaim, adequate or complete remedy at law, in that your petitioner has been obliged to incur great expenses for costs and counsel fees in said matter, and if said cause is further prosecuted your petitioner will be obliged to incur further expenses for costs and counsel fees and to incur large expenses for witness fees in bringing a large number of witnesses from the Island of Hawaii to Honolulu and otherwise be put to great expense;

Wherefore your petitioner prays that a writ of prohibition may issue forthwith, addressed to the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, and to J. S. Low as next friend of Annie T. K. Parker, prohibiting said Honorable George D. Gear from taking further cognizance of said amended motion and petition of Annie Thelma K. Parker by her next friend J. S. Low to remove A. W. Carter as guardian, and prohibiting said Honorable George D. Gear and said J. S. Low as next friend of Annie T. K. Parker, a minor, from proceed-
7 ing further therewith until further order of the supreme court of the Territory of Hawaii

Dated, Honolulu, September 7th, 1904.

(Signed) ALFRED W. CARTER,
Guardian of the Property of Annie T. K. Parker, a Minor.

BALLOU & MARX,
Of Counsel for A. W. Carter, Guardian.

HONOLULU, OAHU, } ss:
Territory of Hawaii, }

A. W. Carter being duly sworn on oath deposes and says that he is guardian of the property of Annie T. K. Parker, a minor, and petitioner in the above entitled cause; that he has read the foregoing petition and knows the contents thereof, and that all and singular the matters and things therein alleged are true to his own knowledge.

(Signed) ALFRED W. CARTER.

Subscribed and sworn to before me this 7th day of September, A. D. 1904.

(Signed)
[SEAL.] A. M. McBRYDE,
Notary Public, First Judicial Circuit.

8 EXHIBIT "A."

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate. At Chambers.

In the Matter of the Guardianship of ANNIE T. K. PARKER, a Minor

Amended Motion and Petition of Annie Thelma K. Parker, by Her Next Friend, J. S. Low, to Remove A. W. Carter as Guardian.

Now comes Annie Thelma K. Parker, a minor, by J. S. Low her next friend, and shows to your honor:

I.

That Martha Fuller Low, mother of said J. S. Low, is the first cousin of Samuel Parker; that said Samuel Parker is the grandfather of Annie Thelma K. Parker, hereinafter referred to as "minor," over whose property A. W. Carter was appointed guardian on the 25th day of September, A. D. 1899, and duly qualified and is still such guardian.

II.

That John P. Parker, hereinafter referred to as "John P. Parker the younger," was the son of said Samuel Parker and the father of said minor, and he and said J. S. Low were reared together in the home of one John P. Parker, hereinafter referred to as "John P. Parker the elder," and grew from childhood to manhood together,
9 and were as fond of each other as though they were brothers.

III.

That said J. S. Low by reason of the relations aforesaid has always taken a great interest in the affairs of said minor.

IV.

That said J. S. Low has examined the accounts of said A. W. Carter as guardian of said minor, heretofore filed in the circuit court of the first judicial circuit, and has discovered that said A. W. Carter has charged said minor commissions at the rate of 10%, 7% and 5% on the gross income of the estate of said minor; that while said J. S. Low is informed that the commissions charged as aforesaid are the statutory commissions, yet, in view of the large amount of income of the estate (the commissions of said A. W. Carter amounting for the year ending 1903 to $2,091.48), the amount charged is in excess of the value of the services actually rendered; that petitioner is informed and believes and upon such information and belief alleges and avers

that reputable and responsible business men in the city of Honolulu will do the same work for a commission not to exceed 5%, and petitioner believes that a competent and reliable person can be secured to do it for 3½%, and that said A. W. Carter is only charging 3½% on gross income for almost similar services.

V.

That said John P. Parker the elder and said Samuel Parker carried on as partners a ranch business, known as the Parker ranch, and that said John P. Parker the elder died about thirteen years ago; that since his death said Samuel Parker has carried on the business of said partnership.

10

VI.

That nearly all of the income of said minor is derived from said partnership in said Parker ranch, of which the said Alfred W. Carter has had, for several years last past, the charge and control, and that said A. W. Carter has charged on the gross income from said ranch a commission of 3⅓%, so that not only does said A. W. Carter charge the statutory commissions of 10%, 7% and 5% as aforesaid, but in addition thereto obliges the said minor to pay 3⅓% on the entire amount of her share of the gross income from said ranch, making his commissions exceed 13⅓%, 10⅓% and 8⅓%; that 3⅓% is also an excessive amount for said A. W. Carter to charge for looking after the business of said ranch.

VII.

That said A. W. Carter during all the time he has had the charge and control of said ranch has had his home in Honolulu, and has been several times absent from the Hawaiian islands, and for several years last past has had his brother, F. W. Carter, in the actual management of said ranch under a salary; that said F. W. Carter is incompetent to perform the duties required, and has, as petitioner is informed and believes, mismanaged the affairs of said ranch, and with the full knowledge of said A. W. Carter in the following particulars:—

(1.) That A. W. Carter employed his brother, F. W. Carter as bookkeeper of the said Parker ranch, well knowing that he, said F. W. Carter, was incompetent and did not understand bookkeeping, and not able to keep the accounts of said ranch in a proper manner.

(2.) That said A. W. Carter employed said F. W. Carter as manager of the said ranch well knowing that he, said F. W. Carter,

11 was not a ranch manager, and had not had sufficient experience in managing ranches like the one in question, to justify him, said A. W. Carter, in employing said F. W. Carter as such manager, and that said F. W. Carter was not and never has been a proper manager for the said ranch, and that by reason of his mismanage-

ment in the premises, extending throughout the entire term of his management of the said ranch, he has caused great injury to the ranch property and loss to the said minor.

(3.) That said F. W. Carter is not a proper person to have the charge and management of the said ranch, or the control thereof, for the reason that he was not, at the time that he assumed charge and control of said ranch an experienced ranchman, and did not understand the nature of the business entrusted to him, and did not, and has not, since his appointment, properly conducted the affairs of said ranch, but on the other hand has improperly conducted the same, and is lazy, indolent and wasteful, and by reason of his improper, inefficient, and unbusinesslike methods said ranch has greatly suffered, and said minor has been subjected to great loss and injury.

(4.) That said A. W. Carter is an improper person to have the management and control of said ranch, for the reason that he is now very largely interested in a ranch similar in character, to-wit, the ranch of the American Sugar Company, Limited, carrying on business on the island of Molokai, where his interests must necessarily clash with his duties with reference to said Parker ranch, and where his duties as guardian of said minor came in conflict with his own interests in the matter of the said American Sugar Company, Limited.

(5.) That said A. W. Carter and his said agents have failed to fence off and protect the forests and source of water supply of the said Parker ranch.

(6.) That said A. W. Carter and his said agents have failed to provide sufficient paddocks for properly carrying on the business
12 of said ranch.

(7.) That said A. W. Carter and his said agents have failed to provide sufficient chutes and appliances to properly handle stock on said ranch.

(8.) That said A. W. Carter and his said agents have failed to keep the buildings on said ranch in repair.

(9.) That said A. W. Carter and his said agents have failed to take proper care of the cisterns at Mana on said ranch, and have failed to supply a pump for serving water to the stock from said cisterns, and have exposed the water of said cisterns to contamination and filth, so that the same has become unfit for use by man or beast.

(10.) That said A. W. Carter and his said agents have maintained a pond called Pelekuaia, in an insanitary, filthy and unhealth- condition, in consequence of which animals on said ranch have been injured and many have died, and said pond is a constant menace to the health of said livestock on said ranch.

(11.) That said A. W. Carter and his said agents have laid water pipe lines on the lands of said ranch in an improper and unskillful manner, and in consequence thereof the same are frequently out of repair and broken.

(12.) That said A. W. Carter and his said agents have failed to properly care for the carts, tools and implements and other personal property of the said Parker ranch, and have left them out in the open exposed to the sun and the rain.

(13.) That said A. W. Carter and his said agents have allowed gates, hinges, etc., to remain out in weeds and grass to rot for more than a year at a time, after the same have been made and ready to be put in place.

(14.) That said A. W. Carter and his said agents have given frivolous and contradictory orders to the men, and much
13 valuable time has thereby been wasted at a great loss to the said ranch.

(15.) That said A. W. Carter and his said agents have pursued unsystematic business methods with reference to the said ranch, whereby the operations of said ranch have been impeded and unsuccessful, entailing a great amount of injury and waste of time, and in consequence of which the work on said ranch could not and did not proceed in an effective, judicious and economical manner.

(16.) That said A. W. Carter and his said agents have improperly herded and driven the neat stock on said ranch, in consequence whereof large numbers have been injured and killed.

(17.) That said A. W. Carter and his said agents have confined the said neat stock on said ranch in improper places where they have had neither food nor water, and in consequence thereof large numbers have died.

(18.) That said A. W. Carter and his said agents have failed to brand a large number of the neat stock on said ranch, and have not taken proper precaution to prevent inbreeding.

(19.) That said A. W. Carter and his said agents have improperly castrated the bulls on said ranch, whereby large numbers have been injured, and in consequence thereof large numbers have died.

(20.) That said A. W. Carter and his said agents have improperly spayed cows belonging to the said ranch, and have spayed such cows in such an improper and unskilful*l* manner that large numbers have died in consequence thereof.

(21.) That said A. W. Carter and his said agents have slaughtered and sold to be slaughtered large numbers of cows in calf and thereby deprived said ranch of a large portion of the natural increase
14 of its herd of neat stock; and have slaughtered animals in a barbarous and disgusting manner, and without proper facilities.

(22.) That said A. W. Carter and his said agents have carried on the business of driving and caring for the neat stock on the said ranch more in the nature of a sport than of serious work, the operation of lassoing said neat stock and the treatment of them in the pens being look*ing* forward to as a general gala day in the district where the same has been carried on, greatly to the injury of said stock.

(23.) That said A. W. Carter and his said agents have conducted

the dairy at Mana on said ranch in an unsanitary and offensive manner, milking the cows in open, with the mud in places up to their bellies, with udder all besmeared with mud, and have failed to provide proper facilities for milking and caring for said cows, many going unmilked, in consequence of which cows have been separated from their calves, and many cows have suffered and many cows have died, and have conducted the said dairy without proper inspection, and with unskilled, unintelligent and improper labor.

(24.) That said A. W. Carter and his said agents have failed to provide proper paddocks and facilities for treating sick and diseased animals, and have allowed sick and diseased animals to herd with healthy ones.

(25.) That said A. W. Carter and his said agents have failed to take proper precautions to prevent the spread of ivy, lantana, Scotch thistle, periwinkle, fox-tail, cockleburrs, lelelcihua and other noxious shrubs on the lands of said Parker ranch, and have spent money recklessly, without proper consideration, and with little or no effect in trying to exterminate the same.

(26.) That said A. W. Carter and his said agents have not given proper personal attention to matters that should properly demand their personal attention.

(27.) That said A. W. Carter and his said agents have without proper consideration, disposed of the horses belonging to said ranch.

(28.) That said A. W. Carter and his said agents have tamed horses belonging to said ranch in an improper and inefficient manner

(29.) That said A. W. Carter and his said agents have failed to properly tame the neat stock on said ranch.

(30.) That said A. W. Carter and his said agents do not give proper supervision to the work of said ranch, and have not properly instructed those in charge of different departments of ranch work, and have not received proper reports from such heads of departments, to which is largely due a large part of the inefficient conduct of the said ranch.

(31.) That said A. W. Carter and his said agents have failed to make accurate counts of the stock on said ranch, and have failed to make complete drives of said stock.

(32.) That said A. W. Carter has projected the construction of a paddock and the laying of a pipe line at large expense, and the same as projected will be of little value to the said ranch, and not commensurate with the outlay that will be incurred.

(33.) That said A. W. Carter has erected improvidently on said ranch, buildings and structures at a large expense that are of very little utility, and has wastefully used material in the construction and operation of structures and erections, and has cost more than suitable material need to have cost.

(34.) That said A. W. Carter and his said agents have failed to take proper measures to exterminate wild dogs that pray upon the animals of said ranch.

16 (35.) That said F. W. Carter has been frequently under the influence of intoxicating liquor during working hours, and thereby incapacitated himself from properly attending to the work of said ranch, and has likewise frequently absented himself from the work of said ranch for the purpose of gratifying his own personal pleasures.

VIII.

That said A. W. Carter has failed to protect the interests of said minor with reference to her property in the following manner:

(A.) A portion of the property of said minor consists of about 1700 acres of land, known as the land of Paauhau, situate in Hamakua, on the island of Hawaii, which is at present leased to the Paauhau Plantation Company for about $1200.00 per annum, that said lease will expire in about seven years from this time that said land at the present time is of great value to the Paauhau Plantation Company, which is desirous of purchasing the same.

(B.) That the value of said land depends very largely upon whether or not a ditch shall be constructed for the purpose of conducting the water from Waipio valley into Hamakua, crossing the lands in question, a company for which has been formed, known as the Hamakua Ditch Company, Limited, and work upon said construction must be commenced at a very early date, or the enterprise will be abandoned.

(C.) That a right-of-way for said ditch over said land for the unexpired term of the lease to said plantation company will not justify the construction of the said ditch, and said ditch will not be constructed unless some arrangement can be made whereby a permanent right-of-way for said ditch over said land can be acquired, and said A. W. Carter has refused to entertain any proposition for granting said right-of-way.

17 (D.) That said plantation company is willing, in case it purchases said land, to grant said right-of-way.

(E.) That petitioner is informed and believes and upon such information and belief alleges and avers that said plantation company recently made application to said A. W. Carter to purchase said land, and said A. W. Carter in consequence of said application went to inspect said land, and after having made inspection thereof returned to Honolulu and made a verbal offer to sell said land to said plantation company for the sum of $124,000; that thereupon said offer of $124,000. was accepted whereupon said A. W. Carter imposed another condition, namely, that he would sell only in case he could purchase the interest of said Samuel Parker in said partnership or Parker ranch.

(F.) That petitioner believes that this condition was imposed with the expectation that influence could thereby be brought to bear upon said Samuel Parker to sell his said interest for less than its actual value, for the reason, as petitioner also believes, said A. W. Carter supposed that said Samuel Parker was largely interested in said

ditch company, and in order that said ditch could be constructed, said Samuel Parker would sacrifice his interest in said ranch.

(G.) That the conditional acceptance of said sum of $124,000.00 being unreasonable and not within the power of said plantation company to comply with, the sale of said Paauhau land was not consummated.

(H.) That said price which said A. W. Carter agreed to accept for said Paauhau land was a very high price for the same, for the reason that as good or better land in or near the same locality in small lots, sells for $40.00 and less per acre.

18 (I.) That said sum of $124,000. if put out at interest, would produce to the said ward about $7440.00 per annum, and this would increase the net annual income of her estate $6240.00.

(J.) That in addition to the above reasons for the sale of said land as aforesaid, petitioner is informed and believes, and upon such information and belief alleges and avers that it is very doubtful if, at the end of seven years anything like $124,000. can be obtained for said land in case said ditch shall not be constructed, and deponent also believes that it will then be impossible to lease said land for a sum equivalent to the interest on $124,000., and that a large part of said land may then be valuable only as pasture land.

(K.) That petitioner alleges that said A. W. Carter has disregarded the best interests of said minor, and that said minor is being subjected annually to great loss by reason of the mismanagement of her estate in consequence of the acts of said A. W. Carter.

IX.

That on the 9th day of June, 1904, said A. W. Carter as guardian of said minor, filed in the circuit court of the third judicial circuit, Territory of Hawaii, at chambers, in equity, his bill for partition, praying, among other things, that the land held in fee and under lease by said Samuel Parker and said minor, known as the Parker ranch, be partitioned, and the cattle and other livestock depasturing thereon be divided between said minor and said Parker, and petitioner is informed and believes and upon such information and belief alleges and avers that heretofore, to-wit, on or about the 13th day of June, 1904, said A. W. Carter caused a copy of his said bill for partition to be filed in a certain suit in equity, now pend-

19 ing in the circuit court of the first judicial circuit, wherein A. W. Carter guardian of said Annie T. K. Parker is plaintiff, and said Samuel Parker, F. Wundenberg and Eben P. Low are defendants, which copy petitioner prays leave may be considered as a part of this petition, and by reference to which the matters and things hereinabove alleged on information and belief will more fully and at large appear, and petitioner further says that he is informed and believes and upon such information and belief alleges and avers, that heretofore, to-wit, on or about the 16th day of June, 1904, said A. W. Carter as guardian, procured the appointment, by the circuit

judge of the third judicial circuit, of one E. E. Conant, as receiver of said Parker ranch.

X.

That petitioner further says that a partition in kind of the said property known as the Parker ranch will be ruinous to the interests of said minor; that said A. W. Carter, unless removed from his guardianship by this honorable court will prosecute said suit for partition to final determination, and petitioner greatly fears that partition of said property may be ordered, and in that event the estate of said minor will be greatly diminished in value, and that in consequence thereof said minor will suffer irreparable injury and wrong. That the irreparable injury and wrong which said minor will suffer is as follows:

(1.) That petitioner is informed and believes and upon such information and belief alleges and avers that the lands comprising the Parker ranch have an area of about 380,000 acres, of which about 140,000 acres is owned by said minor with Samuel Parker in fee simple; that 2000 acres and over is owned by said minor; that 4000 acres and over is owned by said Samuel Parker; that about 112,000 acres is leasehold under several different leases, most of which are in the name of said Samuel Parker; that the terms of said leases expire at different times, some of said terms being very short; that a question has been raised as to whether or not the said minor has any interest at all in the said leaseholds; that so long as said Samuel Parker does not object to the use by the said ranch of the said leased property, it is immaterial whether the said leases are the individual property of said Samuel Parker or are owned jointly by said Samuel Parker and said minor; that said Samuel Parker has informed petitioner that he has no intention of disturbing the present conditions; that should said ranch be partitioned, and said Samuel Parker claim and be declared to be the sole owner of said leases, said minor would suffer tremendous loss.

(3.) That it will be impossible to divide said lands owned by said parties as tenants in common, so that each can have her and his full, fair, just and proper share thereof; that among many other reasons why it is so impossible to divide the said lands is the fact that said lands differ greatly in quality some being fattening lands and others being ordinary range lands and that it becomes necessary to take the cattle from one location to another at different seasons of the year; another reason is that said lands are very largely devoid of water, and in order to supply the stock on said ranch with water, it becomes necessary to conduct water in pipes to different paddocks for a distance of many miles.

(3.) That should the lands be ordered sold by reason of being incapable of division, or should the said leaseholds be adjudged to be the sole property of said Samuel Parker, said minor would have no land upon which to run her share of the stock of said ranch, and said stock would of necessity, have to be sold,

which could not be done except at a tremendous sacrifice and loss to said minor.

(4.) That in case said lands and stock should be partitioned in kind a very large amount of money would of necessity have to be spent in fencing said lands so divided, and a large amount of the money thus spent in fencing would be practically thrown away by reason of the fact that the leased lands, as well as the lands owned in fee simple would have to be fenced, which short term leases would not justify.

(5.) That said ranch as a whole should be a highly profitable business, and to divide it, or to sell it and divide the proceeds, would materially lessen the income that said minor should receive under proper management as her share from the ranch property conducted as a whole.

Wherefore petitioner prays that said A. W. Carter guardian of said minor be removed as such guardian, on the ground that he is an unsuitable person to act as such guardian, for that he is charging the estate of said minor with unreasonable, and extortionate commissions; that he is mismanaging the estate of said minor, and refuses to consent to a sale of certain of the real estate of said minor, when it is for the benefit of said minor that the same should be sold, and on the further ground that heretofore, to wit, on the 9th day of June, A. D. 1904, said A. W. Carter as guardian of said minor, filed in the circuit court of the third judicial circuit, Territory of Hawaii, at chambers in equity, a bill for the partition of the lands known as the Parker ranch, and a division of the cattle depasturing thereon, which partition, if allowed by said court will cause irreparable injury and mischief to the estate of said minor, and on the fur-
22 ther ground that heretofore, to-wit, on or about the 16th day of June, A. D. 1904, said A. W. Carter, guardian as aforesaid, obtained in said third circuit court, in equity, the appointment of a receiver of said Parker ranch, the appointment of which receiver will cause irreparable injury to the estate of said minor, and on all the other grounds mentioned in the foregoing petition, and for such other and further relief as to the court shall seem proper.

Dated Honolulu, July 27th, A. D. 1904.

ANNIE THELMA K. PARKER,
By her guardian *ad litem* and next friend,
(S'g'd) J. S. LOW.

CITY OF HONOLULU, }
Island of Oahu, Territory of Hawaii, } ss:

Now comes J. S. Low and being duly sworn on oath deposes and says:

That he is the next friend of Annie Thelma K. Parker, referred to in the foregoing amended petition; that he is the duly appointed guardian *ad litem* of said Annie Thelma K. Parker; that he has

read the contents of the foregoing amended petition and that the allegations therein contained as therein set forth are true, excepting as to those allegations alleged to be on information and belief, and as to those he believes it true.

(S'g'd) J. S. LOW.

Subscribed and sworn to before me this 27th day of July, A. D. 1904.

(S'g'd)
[SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

23

EXHIBIT B.

Before a Judge of the Circuit Court of the First Circuit, Territory of Hawaii.

In the Matter of the Guardianship of ANNIE T. K. PARKER, a Minor.

Decision on Objection to Jurisdiction.

In the demurrer of Alfred W. Carter to the amended petition of Annie T. K. Parker by her next friend, it was claimed that the circuit judge had no jurisdiction of this proceeding, and the decision over-ruling that demurrer mentioned the fact that a grave constitutional question seemed to be involved, which had not however been argued. The question which arose in the mind of the judge was as to whether the statute conferring judicial powers upon the judges at chambers was in conflict with sec. 81 of the organic act of this Territory which provides "that the judicial power of the Territory shall be vested in one supreme court, circuit courts and in such inferior courts as the legislature may from time to time establish," etc. Nowhere in the organic act is judicial power conferred upon the judges of courts named, and the question of jurisdiction of such judges to hear and determine a cause becomes therefore a question of gravest moment.

24 As the question of jurisdiction can be raised at any stage of a case and as the constitutionality of the statutes conferring upon the circuit judges judicial power was not determined upon the ruling upon the demurrer counsel for the guardian have raised it upon an objection to further proceedings in the case. The question then is now squarely presented to be passed upon as to whether or not such statutes are constitutional.

Counsel have cited many cases, among them being four cases which seem to be directly in point.

In a late case in Missouri, decided in 1901, it was held, *per syllabus*, "Under const. art. 6 sec. 1, vesting the judicial power of the State as to matters of law and equity in certain courts, excepting as the constitution itself otherwise provides, the legislature has no power

to authorize a circuit judge to hear and determine all the issues in a suit for a dissolution of a building and loan association in vacation, since such power can only be conferred upon a fully-organized court."

State *v.* Woodson, 161 Mo. 61 S. W. Rep. 252, the court saying,

"The power to try issues in a suit at law or in equity and pronounce judgment or decree upon the facts found or confessed can be conferred under our constitution, only on a fully organized court." *Id.*

In Michigan the supreme court held an assignment act unconstitutional as it gave a judge at chambers power which only a court should exercise, the court saying:

"By art. 6, sec. 1 of our constitution, the judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace * * * Section 2 of this act confers upon the judge in vacation the authority to hear and determine
25 summarily upon the questions of the insolvency of the debtor, his refusal etc. * * * A statute which confers such judicial power upon a circuit judge at chambers is clearly in conflict with art. VI sec. 1 of the constitution.

Risser *v.* Hoyt, 53 Mich. 185, 193–4, 18 N. W. Rep. 611.

In an earlier case the same court said:

"Under our constitution such powers as are strictly judicial in their character can only be vested in certain courts which are named in the constitution itself. The circuit courts,—as courts—have such powers. The judges, as judges, out of court, do not possess them, and cannot be vested with them."

Toledo etc. R. R. Co. *v.* Dunlap, 47 Mich. 462.

That "judicial power" is attempted to be conferred upon the circuit judges by our statutes is clear. They are given power "to hear and determine" and may render "judgments" and "decrees."

See Civ. Laws, sec. 1144, 1145, 1151.

In California, the supreme court held, per syllabi:

"The legislature cannot confer jurisdiction of special cases upon the county judge, nor can it confer such jurisdiction upon any tribunal or officer, except one of the courts mentioned in the sixth article of the constitution.

"The county judge is not the county court, and although the legislature may authorize the judges of courts, at chambers, to perform certain duties in respect to a cause, yet some court must have jurisdiction of the cause."

Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 71, the court saying:

26 "It is our opinion that the legislature is not authorized to provide for the exercise of such jurisdiction by any tribunal other than one of the courts provided for by the constitution, and

that a statute which grants such jurisdiction to a judicial officer cannot be upheld. The opposite view is repugnant to the first section of art. VI (of the constitution) for that section declares that the judicial power of the State shall be vested in certain courts therein enumerated" etc. *Id.* pp. 73, 74.

Approved in Estate of Stevens, 83 Cal., 322.

From these citation- it will be readily seen that there is much force in the contention of counsel for the guardian, and that, notwithstanding the fact that for over four years circuit judges in these islands have heard and determined many cases, the claim of counsel that circuit judges cannot exercise such judicial power, is one that seems to be amply sustained by precedent. While it *seems* to me that counsel is right in his contention, yet the matter is one of such grave importance, affecting as it does, every judgment and decree rendered by every circuit judge in this Territory since the going into effect of the organic act, that with the limited time I have had to give the question I am loath to render any decision thereon.

In determining whether or not a statute is unconstitutional the rule is that a judge of the trial court shall not declare the statute unconstitutional unless he has no doubt of its unconstitutionality. As I cannot, with the limited time which it was possible to give to a consideration of this case, declare that I am *fully* satisfied that the statutes in question are in conflict with the organic act
27 although I am inclined to the opinion that they are, I shall therefore overrule the objection, and it is so ordered.

(Signed) GEAR, *J.*

(Endorsed and filed Sept. 2, 1904.)

(Endorsed and filed Sept. 7, 1904.)

28 *Summons.*

In the Supreme Court of the Territory of Hawaii.

($2. stamps.)

In re Application of A. W. CARTER, G'd'n of the Property of A. T. K. Parker, for a Writ of Prohibition against Hon. Geo. D. Gear, 2nd Judge, 1st Circuit Court, and J. S. Low, Next Friend of A. T. K. Parker.

The Territory of Hawaii to the high sheriff of the Territory, or his deputy; the sheriff of the island of Oahu or his deputy:

You are commanded to serve a copy of the petition and writ hereto attached upon the said Geo. D. Gear second judge of the

circuit court of the first circuit and J. S. Low next friend of Annie T. K. Parker a minor
to appear

to answer the annexed
of

And have you then there this writ with full return of your doings thereon.

Witness the honorable chief justice of the supreme court of the Territory of Hawaii, at Honolulu, island of Oahu, this 7th day of September, 1904.

[SEAL.] (S'g'd) GEORGE LUCAS, *Clerk.*

28½ *Return of Service.*

Served this summons as follows:

On Geo. D. Gear, second judge of the circuit court of the first circuit, and

On J. S. Low, next friend of Annie T. K. Parker, a minor at Honolulu, Oahu, this 8th day of September, A. D. 1904, by delivering to each of them a certified copy hereof and of the petition and writ annexed hereto, and at the same time showing each of them the original as directed.

Dated Sept. 8, 1904.

(S'g'd) ALBERT McGURN,
Deputy Sheriff.

29 In the Supreme Court of the Territory of Hawaii, October, 1904, Term. October, 1904, Session.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable Geo. D. Gear, Second Judge of the Circuit Court of the First Judicial Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Answer of Geo. D. Gear, Second Judge of the Circuit Court of the First Circuit.

Now comes Geo. D. Gear, second judge of the circuit court of the first circuit, one of the respondents herein, and for answer to the petition for and writ of prohibition issued on the 7th day of September, 1904, and pleads and says:

First. That he admits the allegations contained in paragraphs one, two and four of said petition.

Second. That he denies that the amended motion and petition referred to in paragraph 3 of the petition herein was filed in any other

manner than it purports upon its face; and this respondent admits that he has taken cognizance and jurisdiction thereof, and has filed interlocutory decisions, and is about to proceed to a hearing of said cause on its merits, but denies that he has heard the same in any other manner than that regularly authorized by the statutes of the Territory of Hawaii, and the practice of the circuit courts of the Territory.

Third. That he denies the allegations contained in paragraph five of the petition herein, and alleges the truth to be that the said
30 amended motion and petition refer to and are predicated upon all the records in the matter of the guardianship of said Annie T. K. Parker, a minor, which proceeding was originally filed with the clerk of the circuit court of the first circuit, and is still pending in said circuit.

Fourth. That respondent admits the allegations contained in paragraph 6 of the petition herein, except that he does not admit that he acted only under the laws therein referred to, but alleges the facts to be that he has acted in said matter under and by virtue of all the laws of the Territory of Hawaii in the premises.

Fifth. That this respondent submits to the court as to what is the true construction of the laws, matters and things referred — in paragraphs 7–8–9 of the petition herein.

All of which matters and things this respondent prays may be inquired of by the court.

(S'g'd
GEO. D. GEAR,
2nd Judge Circuit Court of First Circuit.

Dated, Honolulu, October 1st, 1904.

(Endorsed and filed Oct. 3, 1904.)

31 In the Supreme Court of the Territory of Hawaii, October, 1904, Term. October, 1904, Session.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable Geo. D. Gear, Second Judge of the Circuit Court of the First Judicial Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Answer of J. S. Low.

Now comes J. S. Low next friend of Annie T. K. Parker a minor one of the respondents herein and for answer to the petition for and writ of prohibition issued on the 7th day of September 1904, pleads and says:

That he submits to the judgment of the court herein.

Dated Honolulu, October 1st, 1904.

(S'g'd)
J. S. LOW,
Next Friend of Annie T. K. Parker, a Minor.

(Endorsed and filed Oct. 3, 1904.)

32 *Request for a Substitute Justice.*

In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In re Application of A. W. CARTER, Guardian of Annie T. K. Parker, for a Writ of Prohibition.

To Hon. J. T. De Bolt:

Mr. Justice Hartwell being disqualified to sit with us in the above entitled cause, we, the remaining justices of the supreme court, hereby request and authorize you to sit with us and hear and determine the said cause.

Dated the 20th day of October 1904.

(S'g'd) W. F. FREAR.
(S'g'd) F. M. HATCH.

Attest:

(S'g'd) GEORGE LUCAS, *Clerk.*

(Endorsed and filed Oct. 20, 1904.)

33 Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of A. W. CARTER, Guardian of A. T. K. Parker, for a Writ of Prohibition.

HONOLULU, MONDAY, *October* 3, 1904.

Clerk's Minutes.

Motion to advance.

Before Frear, C. J., and Hatch, J.; Hartwell, J., disqualified.

Ballou and Marx appeared for the petitioner and Magoon and Lightfoot for the respondent.

Mr. Magoon reads motion to advance and argues.

Mr. Ballou argues.

The court grants the motion to advance and sets the case for hearing on Monday, Oct. 17, 1904.

Mr. Ballou presents a petition for leave to amend.

Mr. Magoon offers no objections.

The court allows the amendment.

34 Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of A. W. CARTER, Guardian of A. T. K. Parker, for a Writ of Prohibition.

HONOLULU, THURSDAY, *October 20th*, 1904.

Clerk's Minutes.

Petition for writ of prohibition.

Before Frear, C. J.; Hatch, J., and Judge De Bolt.

Kinney—McClanahan & Cooper, Robertson & Wilder and Ballou and Marx appeared for the petitioner and J. A. Magoon and J. Lightfoot for the respondent.

Counsel agree to submit both cases for writ of prohibition together.

Mr. Ballou argues.

At 12 m. a recess is taken till 2 p. m.

At 1.30 p. m. Mr. Ballou continues with his argument.

Mr. W. O. Smith argues.

Mr. Magoon argues.

At 4.30 p. m. the court adjourns for the day.

FRIDAY, *October 21st*, 1904.

Mr. Magoon continues with his argument.

Mr. Withington argues.

At 12 m. a recess is taken till 2 p. m.

At 2 p. m. Mr. Withington continues with his argument.

At 1.35 p. m. Mr. Warren argues.

35 At 3.10 p. m. Mr. Ballou replies.

At 4.5 p. m. the court adjourns until Monday October 24th.

36 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Original.

Argued October 20–21, 1904; decided November 7, 1904.

Frear, C. J.; Hatch, J., and Circuit Judge De Bolt in place of Hartwell, J.

Circuit judges at chambers—independent jurisdiction in equity and probate matters; not impliedly repealed by organic act.—The equity and probate jurisdiction of circuit judges at chambers existing under the Hawaiian constitution, which vested the judicial power in one supreme court and such inferior courts as the legislature might establish, was not impliedly repealed by the provision of the organic act which vested such power in one supreme court, circuit courts, and such inferior courts as the legislature might establish. Although the powers of judges at chambers are usually limited to matters incidental or ancillary to causes pending in court,
37 judges at chambers, so-called, have in Hawaii not only such incidental powers but also independent jurisdiction in equity and probate matters. But such independent jurisdiction is exercised by such judges as courts of record, and not privately or summarily,—the phrase "circuit judge at chambers" being in such case merely a method of describing such courts.

Construction—rules of, applied.—In constructing a doubtful provision of an act, other provisions, the act as a whole, and its reason and spirit, may be considered; also the circumstances under which it was adopted, the history which preceded it, and the consequences of proposed constructions; weight may be given to long continued, unquestioned and contemporaneous construction; if the provision is borrowed, the construction placed upon it previously may be considered; repeals by implication are not favored; *expressio unius est exclusio alterius*.

38 Opinion of the court by FREAR, *C. J.*:

This is an application for a writ of prohibition to restrain further proceedings in a matter instituted by the respondent J. S. Low, as next friend of Annie T. K. Parker, a minor, before the respondent the second judge of the circuit court of the first circuit, at chambers,

for the removal of the petitioner as guardian of the property of the said Annie T. K. Parker. That matter was brought and is pending before the circuit judge at chambers under the provisions of sections 37 and 38 of chapter 57 of the Laws of 1892, commonly known as the judiciary act (C. L., sections 1145, 1146), as amended by sections 11 and 12 of act 32 of the Laws of 1903; and also sections 1343–1395 of the Civil Code of 1859, (Civil Laws, ch. 126), as amended by act 16 of the Laws of 1903,—these being the principal provisions that purport, among other things, to confer and to some extent define the jurisdiction of circuit judges at chambers in guardianship matters. The contention is that these provisions are void as being in conflict with section 81 of the organic act, which reads as follows:

"SEC. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

It is argued that this section vests all the judicial power of the Territory in certain courts and that therefore none can be vested by Hawaiian laws, whether old or new, in circuit judges at chambers; that the powers of a judge at chambers are limited to matters incidental or ancillary to causes pending in court and do not extend to the hearing and determination of matters of a judicial nature
39 that are independent of any cause pending in court. A number of cases are cited in support of this view, particularly Ballard *v.* Carr, 48 Cal. 70; Risser *v.* Hoyt, 53 Mich. 185; Toledo A. A. & G. T. Ry. *v.* Dunlap, 47 Mich. 456; Rowe *v.* Rowe, 28 Mich. 353; P. Ft. W. & C. K. W. Co. *v.* Hurd, 17 Oh. St. 144; State *v.* Woodson, 161 Mo. 444; McKnight *v.* James, 155 U. S. 685. These cases differ to a greater or less extent from the present case in the language of the constitutional and statutory provisions involved and the circumstances under which those provisions were adopted as well as under which those cases arose, and there are other cases that tend the other way; and yet the cases cited contain reasoning of great force in support of the petitioner's contention.

The present case, however, can not be decided solely as if there were a definite constitutional or organic provision intended to control the organization of a judicial system in the future where none existed previously, or to be chiefly declarative of a different system previously existing, or to introduce radical changes in a previously existing system. No doubt the organic act may be regarded as in the nature of a constitution from the standpoint of the Territory, and Hawaiian laws relating to the judiciary, whether previously existing or subsequently enacted, cannot stand if in conflict with the provisions of that act (see 23 Ops. 539); and the circuit courts mentioned in section 81 of that act may, perhaps, be regarded, from the territorial standpoint, as constitutional courts. See Hind *v.* Wilder's S. Co., 14 Haw. 222; *Ex parte* Smith, 14 Haw.

269. Yet even a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it, and the natural consequences
40 of a proposed construction,—with a view to ascertaining the intention of its framers. This rule is especially applicable in the case of an act which, as in the case of the organic act now in question (a legislative act from the standpoint of the body that enacted it), contains many different provisions bearing upon the same subjects; which was enacted with reference to a highly developed system of government already existing; and which manifests upon its face from beginning to end an intention to continue that system except as changed in certain respects by that act. See particularly sections 1, 6–10, 64, 68, 71–79, 81, 83, 91. Many other sections which do not on their face show a general intent to continue the Hawaiian laws in force were themselves taken in whole or in part from the Hawaiian constitution of 1894, as, for examples, sections 11–54, 57–62, 80, 82, 84, 99. A striking illustration of the application of these rules of construction is found in the case of Hawaii *v.* Mankichi, 190 U. S. 197, in which the literal meaning of a provision of the joint resolution of annexation, which in a sense was the constitution of Hawaii for about two years, was held to be controlled by the general intent shown by the resolution as a whole, by the circumstances under which it was adopted, the past history of Hawaii and her judicial system, and the disastrous consequences that would result from a narrower construction. It is also a general rule of construction that when one State borrows a law from another State it also borrows the construction previously put upon it by the first State. Congress in the organic act not only adopted in general terms the laws of Hawaii, including those relative to the judiciary department, with certain exceptions (see 23 Ops. Att'y Gen'l, 539), but it borrowed the provisions of the organic act itself rela-
41 tive to the fundamentals of the judiciary mainly from the Hawaiian constitution of 1894, which were also in the Hawaiian constitutions of 1852, 1864 and 1887. Compare sections 81, 82 and 84 of the organic act with articles 82, 83 and 89 of the constitution of 1894. The division of jurisdiction between courts and judges at chambers, so-called, has existed, without its validity being questioned, under all of these constitutions.

This is a question of construction. It is not inherently impossible to confer independent jurisdiction of cases not requiring trial by jury upon judges at chambers. That may be done by constitutional provision or by statute in the absence of constitutional restriction. See Wilcox *v.* Wilcox, 14 N. Y. 577; Brewster *v.* Hartley, 37 Cal. 15; Stewart *v.* Daggy, 13 Neb. 290. Nor would it seem inappropriate where, as in Hawaii, the jurisdiction so conferred has as a rule been of an equitable as distinguished from a legal nature—such as was formerly exercised in England by the equity, ecclesiastical and admiralty courts—and has been exercised with the

formality and publicity usually obtaining in courts of law. The words "at chambers," indeed, may be used, and have been used here, in various senses. They may mean the judge's lodgings or private rooms or they may mean a room set apart, like an ordinary court room, for hearing matters without a jury. See Com. *v.* McLaughlin, 122 Mass. 449. Likewise, proceedings at chambers may imply a certain decree of informality; they may be more or less summary and before a judge acting privately without a clerk; or, they may be formal, instituted by petition and process, with service of summons as in cases before courts of law, and heard in a public court room by the judge with clerk, bailiff, and all the elements that are usually supposed to make up a court of record. Even the word "court" is subject
42 to more or less confusion. It is sometimes used to denote all that makes up the court, and sometimes to denote merely the presiding judge of the court. Again, in order to be a court, a body need not have a particular name. It may be designated a "circuit court" or it may simply be called a court with jurisdiction to hear and determine certain classes of cases. "District courts" and "district magistrates" are used interchangeably in our statutes to denote the same court. It is a court, though not of record. Commissioners of private ways and water rights under our statutes hold courts without names. A court is a political being. It is incorporeal. It may be described or designated in various ways—even without the use of the word "court" at all.

The words "court" and "chambers" have been used in various senses in Hawaii for more than half a century, but with recognized meanings, whether in statutes or judicial decisions, according to the circumstances. Powers at chambers of the incidental or ancillary sort have been conferred, but the words "at chambers" and other words deemed equivalent have also been used to signify certain distinctions in independent matters. The superior courts of record have borne different names from time to time, but superior jurisdiction has always been divided between the courts under their respective names and the judges of such courts at chambers. This has been a convenient way of indicating certain distinctions. The distinction is in general that between law and equity. The court under its proper name, as, for instance, the "circuit court," sits at regular terms, with a jury, in law cases, which go to a higher court by bill of exceptions. The "circuit judge at chambers," or the "circuit judge," the "judge of a court of record at chambers," the "circuit court at chambers," the "probate court," the
43 "probate judge at chambers," etc., as he is variously called, sits continuously, without a jury, in equity and probate, and formerly in admiralty and bankruptcy cases, which go to a higher court by general appeal. There is a court, without a proper name, of the circuit judge at chambers. It has often been referred to in both the statutes and judicial decisions as the court of equity or the court of probate, etc. Moreover, it is a court of record,

with clerk, bailiff, etc. It usually sits in the public court room of the circuit court. It sometimes sits in the judge's room or chambers adjoining, as a matter of convenience. The court also, as distinguished from the judge or the judge at chambers, has sat in the judge's chambers in matters not requiring a jury, or jury waived, or even with a jury, as a matter of convenience or necessity, though naturally not often, at least with a jury, for it is not convenient to have a jury in chambers. For the last twelve years cases could be brought to this court by writ of error as well as by appeal from circuit judges at chambers just as they may be brought by writ of error as well as by exceptions from circuit courts, and that is still the case.

The jurisdiction and procedure of the courts and the judges at chambers is not all defined by statute. Much of it is covered by statute only in a very general way. For instance, judges at chambers are given jurisdiction in equity in general terms—which means that they have such equitable jurisdiction as has been exercised in chancery in England and the equity courts in America. Even the act of 1878, which enumerates many subjects of equity jurisdiction is not exclusive, although it was taken from the Massachusetts statute, which is there held exclusive. See Dole *v.* Gear, 14 Haw. 560. Similarly as to guardianship matters. See Hoare *v.* Allen, 13 Haw. 262.

44 Much, as to jurisdiction and procedure, is governed by what may be considered Hawaiian common law,—that has grown up without the aid of statute or has been built upon statutes by inference and been recognized by bench and bar and has to some extent been assumed in the enactment of statutes. In fact, the judiciary has developed here, especially in its earlier period, much as it did in early English history, gradually and largely without the aid of statute. There was a gradual separation of judicial from executive and legislative functions, a gradual organization of a judicial system, introduction of trial by jury, separation of law and equity, separation of civil and criminal matters at law, and of equity, probate and admiralty matters at chambers, and of the functions of the judge and the jury, and a gradual development in forms of pleading and practice. This began long before the first constitution, that of 1840, the provisions of which were somewhat crude and meager and but little suggestive of the system, especially so far as the superior courts of record—the governors' courts—were concerned, that then existed and rapidly developed for some years afterwards. Prior to the constitution of 1840, there were scarcely any statutory provisions relative to the judiciary. After that until the act of 1847, organizing the judiciary, there was little more than the act of 1842 (Blue Book, p. 170), which related chiefly to juries and began: "There are two distinct kinds of courts. One kind where the judges or tax officers decide the case by themselves, and the other kind where they can not act by themselves, but certain other persons must be associated with them. These persons who are associated with them shall constitute the jury." The first comprehensive act

covering the judicial system with any degree of completeness was that of 1847. That is largely the basis, directly or indirectly, of all subsequent comprehensive acts relative to the judiciary. It divided jurisdiction between certain named courts and judges at chambers. Then came the constitution of 1852, which has been the basis of all subsequent constitutions. It provided in article 81: "The judicial power of the kingdom shall be vested in one supreme court, and in such inferior courts as the legislature may from time to time establish." This was followed the next year by the second comprehensive judiciary act, drafted, we believe, by the same person who drafted the constitution, Chief Justice Lee. The main object of this act was to conform the laws to the change in the supreme court. The former supreme court, consisting of the king, premier, and four chiefs, whose functions had practically ceased, was dropped altogether, and what had previously been the superior court of law and equity in name, but had already become practically the supreme court as well in reality, was made such in name also. This act also preserves the distinction between the courts and the judges at chambers, in matters of jurisdiction, procedure, methods of appeal, etc. Next came the Civil Code of 1859, embodying, in sections 815–1282, a codification of the laws relating to the judiciary, namely, the acts of 1847 and 1852, and a number of subsequent acts of minor importance, but preserving the distinction between the courts and the judges at chambers in language for the most part still in force in the statute books. The constitution of 1864 followed, copying for the most part the provisions of that of 1852, including the provision now in question, which was article 64 of that constitution. The constitution of 1887 was copied mostly from that of 1864, and contains the same article 64. Meanwhile a number of more or less important acts were passed more fully defining or altering in detail the jurisdiction and procedure, that already for the most part existed, in regard to particular subjects. These are set forth in the compilations of 1884 and 1897, which were not enacted. The judiciary act of 1892 made some important changes in the organization of the judiciary and the jurisdiction of the courts but preserved the same distinction between the courts and the judges at chambers. The constitution of 1894 copied the provisions of that of 1864 relating to the judiciary with some changes not material to the questions now under consideration. The provision now particularly in question appears as article 82. In view of the fact that constitution after constitution and statute after statute has been adopted by constitutional conventions and legislatures and accepted without question by bench and bar and the public throughout the sixty-four years of organized constitutional government in Hawaii, recognizing the constitutionality and propriety of provisions such as those now called in question, coupled with the fact that the "judges at chambers" in the exercise of jurisdiction in equity and probate matters are and have been regarded as courts,

and not only that, but courts of record, it would be preposterous to hold that the statutes conferring or defining such jurisdiction of judges at chambers would be void under Hawaiian constitutions or immediately prior to the enactment of the organic act.

Under the constitutions of Hawaii, the courts of the circuit judges at chambers as well as the circuit courts, have been established by the legislatures as inferior courts, that is, inferior to the supreme court, in the exercise of the power to establish such courts under the constitutional provision in question. What the relation between a circuit court and the court of a circuit judge at chambers is, is an interesting question that was much argued in this case but need not be decided. In some jurisdictions law and equity are ad-
47 ministered by distinct courts as well as by distinct forms of procedure; in others by the same courts though by distinct forms of procedure: in still others by the same court through the same forms of procedure. Whether the circuit court and the court of the circuit judge at chambers should be regarded as one, that is, whether they should be considered merely as the law and equity sides of the same court, or whether they should be considered as distinct courts, though presided over by the same judges, is a question upon each side of which much can be said. Many statutory provisions as well as many decisions may be regarded as pointing in each direction and yet are not necessarily inconsistent with either theory. Among the cases see Kendall *v.* Holloway, 16 Haw. 45; Kala *v.* Mills, 15 Haw. 422; Hind *v.* Wilder's S. Co., 14 Haw. 215; 223; Silva *v.* Souza, 14 Haw. 46; Willard *v.* Vincent, 13 Haw. 237; Kona Coffe Co. *v.* Circuit Court, 10 Haw. 571; Est. of Metcalf, 3 Haw. 614. A discussion of the numerous statutes and decisions would be too lengthy. Whether the court of the judge at chambers is the same as the circuit court or a different court, it is a court, and it is a court of record, and it and its predecessors have existed unquestioned for more than fifty years.

The question is not merely whether Congress intended by section 81 of the organic act to prohibit the creation of such a court in the future but whether it intended to abrogate such courts already existing. That section is borrowed with modifications from the provision above quoted found in the last four Hawaiian constitutions, under which such courts must be held, under the rule of long continued and unquestioned as well as contemporary construction, not to mention other rules, to have been legally constituted. If no modifications had been made in this borrowed section, could we hesitate to hold that Congress did not intend that it should mean something so radically different from what it has been construed for half a
48 century to mean, or that Congress did not intend by adopting the same provision to repeal by implication what had become so thoroughly established under it? Do the modifications require a different construction? The only modification in the main provision of this section consists in the insertion of the words "circuit courts." It is contended that this modification in itself shows an

intention to introduce a change in the judicial system of Hawaii. That is not a necessary inference. If we could with propriety look to the reports in the Congressional Record of the reasons given for inserting these words by way of amendment on the floor of Congress, we should find it to be an erroneous inference. The insertion of these words would naturally, in view of the fact that there were already circuit courts here, be considered as preservative rather than destructive. Those words, of course, mean such circuit courts as were already here. Otherwise there would be nothing to indicate what their nature was to be, except that they should be "circuit" courts—which gives no clue to their jurisdiction as respects either subject matter or territory. The continuation of Hawaiian laws relative to the judiciary also shows that the existing circuit courts were meant. Congress did not define the jurisdiction of such courts except by reference to the laws of Hawaii. The apparent object of inserting the words "circuit courts" was to insure a continuance of those courts rather than the abrogation of other courts, and the reason why it was thought best to insert these words for that purpose may have been the possibility of doubt as to whether such courts, being courts of record of general jurisdiction, would be included under the words "inferior courts." Several reasons may easily be imagined as likely to suggest the advisability of inserting these words. In the nature of things there might be courts of
49 circuit judges at chambers consistently with the presence of the words "circuit courts" in this provision, as well as there could be courts of judges at chambers under the original provision in the Hawaiian constitution, when there were courts of the justices of the supreme court at chambers, during the period when they had original as well as appellate jurisdiction, notwithstanding the words "supreme *court*" in the constitutional provision, or when there were courts of circuit judges at chambers notwithstanding the words "inferior *courts*." Indeed, if we must infer an intention to make radical changes by the introduction of these words, we may as well infer that Congress meant "circuit" courts strictly speaking, that is, courts that travel about the circuit, and so to abrogate the existing circuit courts which had become fixed although they retained the name that they had years ago when they did travel.

But it is contended that the remainder of the section shows that a change was intended. This, to repeat it, reads as follows: "And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." The argument is that "herein" refers to this section and not to the entire act, and that, since the insertion of the words "circuit courts" is the only change made, the phrase "*except* as herein *otherwise* provided" must show that a change was intended in the classes of courts. It is clear, however, that "herein" refers to the entire act, and therefore, since a number of changes in the judiciary are made by other sections (*e. g.*, secs. 7, 83, 86), the phrase

in question is fully explained by reference to them. "Herein" may refer to the act as well as to the section. It must be held to
50 refer to the act or else this section would be in conflict with the other sections that make changes in the laws relative to the judiciary. Moreover, the same phrase "except as herein otherwise provided" is found in other sections where it must refer to the whole act. See secs. 5, 12, 35, 48.

The latter portion of section 81, indeed, far from showing an intention to repeal, shows a general intention to continue in force the laws "heretofore in force concerning the several courts and their jurisdiction and procedure." But it is suggested that the laws conferring jurisdiction on judges at chambers were void under the Hawaiian constitutions also, and so were not "heretofore in force." This argument has already been practically disposed of. It is further argued that even if the old laws were continued in force, this would not affect the argument that the new laws, namely, the amendments of 1903, above referred to, were void. But (aside from the more reasonable view that future amendments might well be made as to details along lines consistent in principle with the old laws, and the fact that the amendments in question did not affect the old laws materially so far as the questions now before us are concerned), even if the new laws were void, the old laws would remain in force and they cover the ground. It is contended, however, on the other hand, that the old laws were to continue only "until the legislature shall otherwise provide," and that, since the legislature has otherwise provided, namely, in the amendments referred to, the old laws have ceased to be operative. But, as we have seen, the legislature has not otherwise provided except in certain particulars—which do not go to the extent of materially affecting the general jurisdiction of circuit judges in guardianship matters. Moreover, if the new laws are valid, they are sufficient
51 in themselves without the old laws; while, if they are invalid, the legislature has not otherwise provided and the old laws remain and are sufficient in themselves.

Thus, not only is there nothing in section 81 that requires us to hold that Congress intended, by the insertion of the words "circuit courts," to effect the important change contended for—a change by mere vague implication that would abrogate in toto the courts having equity and probate jurisdiction, but there is much in this section to indicate the contrary. This different intention is strongly sustained by other sections of the act. Section 83, for instance, shows a general intent in this direction by providing "that the laws of Hawaii relative to the judiciary department, including civil and criminal procedure, except as amended by this act, are continued in force," etc., and then making certain specific changes, but not in respect to the jurisdiction or powers of judges at chambers. Section 7 expressly repeals many laws relating to the judiciary, such as that conferring upon circuit judges jurisdiction in bankruptcy. It even expressly repeals the "first subdivision of section eleven hun-

dred and forty-five," (relating to admiralty jurisdiction) of the Civil Laws,—the section that is now in question and that defines in twelve subdivisions the jurisdiction of circuit judges at chambers, but does not mention the subdivisions that confer upon such judges equity and probate jurisdiction. *Expressio unius est exclusio alterius. Expressum facit cessare tacitum.* Section 10, entitled "Construction of existing statutes," provides "that all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect if this act shall continue to be as effectual as if this act had not been passed; * * * all actions at law, *suits in equity,*
52 *and other proceedings* then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the *corresponding courts* of the Territory of Hawaii." This permitted the retention by circuit judges at chambers of admiralty cases then pending, although all admiralty jurisdiction over new cases was transferred from them to the United States district court of Hawaii. *Ex p.* Wilder's S. Co., 183 U. S. 545; Wilder's S. Co., *v.* Hind, 108 Fed. 113; Hind *v.* Wilder's S. Co., 13 Haw. 174. It equally authorized the retention by circuit judges at chambers of jurisdiction in equity and probate matters then pending. Some such matters, especially in probate, might not be finally disposed of for several years, during all of which time the circuit judges at chambers would continue to exercise such jurisdiction. This, it is true, is in the nature of an interregnum clause. But it provides for the continuation of such suits and proceedings in the *corresponding* courts of the Territory, thus implying that there were to be such corresponding courts. It was a temporary provision for pending cases, not temporary for existing courts; it provided for the completion of all pending cases, whether of kinds the jurisdiction over which was to remain or be taken away—but in the corresponding courts, which were to continue for new as well as for pending cases. It was not contemplated that such cases should be transferred from circuit judges at chambers to circuit courts; nor is there any indication of an intention to continue the courts of the circuit judges at chambers temporarily only.

The permanent writ is denied and the temporary writ dissolved.

(S'g'd) W. F. FREAR.
(S'g'd) F. M. HATCH.
(S'g'd) J. T. DE BOLT.

Ballou & Marx; Kinney, McClanahan & Cooper; and Robertson & Wilder for petitioner.

J. A. Magoon and J. Lightfoot for respondents.

(Endorsed and filed Nov. 7, 1904.)

53 In the Supreme Court of the Territory of Hawaii.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable Geo. D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Decree.

The above entitled matter having duly come on for hearing before the full court, Messrs. Ballou and Marx appearing for petitioner, and J. Alfred Magoon-J. Lightfoot for respondents, upon full consideration by the court, and in pursuance of the decision this day filed, the petition for permanent writ of prohibition is hereby denied, and the temporary writ heretofore issued herein is hereby dissolved.

Dated Honolulu, November 7th, 1904.

By the court:

(S'g'd) GEORGE LUCAS, *Clerk.*

Approved as to form

(S'g'd) BALLOU & MARX.

(Endorsed and filed Nov. 7, 1904)

54 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and John S. Low, Next friend of Annie T. K. Parker, a Minor. Writ of Prohibition.

Petition for Leave to Amend.

Now comes Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, and moves for leave to amend his petition for a writ of prohibition on file herein by inserting between paragraphs 9 and 10 of said petition the following paragraph, to-wit:

"9*a*. That the circuit court of the first judicial circuit, Territory of Hawaii, has no jurisdiction over the subject matter of said amended motion and petition, nor over any of the matters and things therein alleged, nor over the estate of Annie T. K. Parker, a minor, nor any matter in connection therewith."

ALFRED W. CARTER, *Guardian,*

By his attorneys,

(S'g'd) BALLOU & MARX.

To J. A. Magoon and J. Lightfoot, attorneys for respondents:

Please take notice we shall ask to be heard on the above motion before the supreme court of the Territory of Hawaii on the — day of October, A. D. 1904, or as soon thereafter as counsel can be heard.

Honolulu, October 3rd, A. D. 1904.

(S'g'd) BALLOU & MARX,
Attorneys for Petitioner.

55 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor. Writ of Prohibition.

Order Allowing Amendment.

Upon motion by the petitioner herein for leave to amend his petition for a writ of prohibition by inserting between paragraphs 9 and 10 of said petition the following paragraph, to-wit:

"*9a.* That the circuit court of the first judicial circuit Territory of Hawaii, has no jurisdiction over the subject matter of said amended motion and petition, nor over any of the matters and things therein alleged, nor over the estate of Annie T. K. Parker, a minor, nor any matter in connection therewith."

It is hereby ordered, adjudged and decreed that said amendment be and the same is hereby allowed, and the clerk is hereby ordered to note the same upon the face of the original petition for a writ of prohibition on file herein.

(S'g'd) GEORGE LUCAS, *Clerk.*

(Endorsed and filed Oct. 3, 1904.)

56 In the Supreme Court of the Territory of Hawaii, October, 1904, Term. October, 1904, Session.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable Geo. D. Gear, Second Judge of the Circuit Court of the First Judicial Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Motion to Advance Cause on Calendar.

Now comes J. S. Low, next friend of Annie T. K. Parker, a minor, one of the respondents above named, by his attorneys, J. Alfred

Magoon- J. Lightfoot, and moves this honorable court that the writ of prohibition, heretofore, to-wit, on the 7th day of September, 1904, issued out of said court, be advanced on the calendar so that the same may be heard at an early date of the present session, and bases this motion upon the affidavit of J. Alfred Magoon, hereto attached and made a part hereof, and to which reference is hereby made, and upon the records in said cause.

Dated Honolulu, Sept. 27th, 1904.

(S'g'd) J. ALFRED MAGOON,
J. LIGHTFOOT,
Attorneys for Movant.

To Alfred W. Carter, guardian of the property of Annie T. K Parker, a minor, and to Messrs. Ballou and Marx, his attorneys

You and each of you please take notice that the foregoing motion to advance cause on the calendar will be presented before the honorable supreme court of the Territory of Hawaii, in the supreme court room, Judiciary building, Honolulu, island of Oahu, Territory of Hawaii, on Monday next the 3rd day of October, A. D. 1904, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard.

Dated Honolulu, Sept. 27th, A. D. 1904.

(S'g'd) J. ALFRED MAGOON,
J. LIGHTFOOT,
Attorneys for Movant.

57 In the Supreme Court of the Territory of Hawaii, October, 1904, Term. October, 1904, Session.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable Geo. D. Gear, Second Judge of the Circuit Court of the First Judicial Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Affidavit of J. Alfred Magoon.

CITY OF HONOLULU, } ss:
Island of Oahu, Territory of Hawaii, }

Now comes J. Alfred Magoon and being first duly sworn on oath deposes and says that he — attorney of record for J. S. Low next friend of Annie T. K. Parker, a minor, one of the respondents above named. That the proceedings stayed by the writ of prohibition, heretofore, to-wit, on the 7th day of September, 1904, issued out of the honorable supreme court of the Territory of Hawaii, directed to the Honorable Geo. D. Gear, second judge of the circuit court of the

first judicial circuit, Territory of Hawaii, and to J. S. Low, next friend of Annie T. K. Parker, a minor, were commenced by motion of said J. S. Low, next friend as aforesaid, filed in the circuit court of the first judicial circuit, Territory of Hawaii, for the removal of A. W. Carter as guardian of said minor.

That after the filing of said motion various proceedings were had thereon before the said judge, sitting at chambers in probate, and that the matters involved in said motion, and the amendments thereto are now at issue.

58 That said writ of prohibition brings into question the construction of an act entitled "An act to provide a government for the Territory of Hawaii," passed by the Fifty-sixth Congress of the United States of America on the 27th day of April, and approved on the 30th day of April, A. D. 1900, and the constitutionality of acts 16 and 32 of the legislature of the Territory of Hawaii, at the 1903 session thereof.

That said writ of prohibition not only brings into question the jurisdiction of the said judge, sitting at chambers in probate, of the proceedings for the removal of said A. W. Carter as guardian as aforesaid, but the decision of this honorable court will affect the validity of all proceedings in equity and probate, and proceedings for divorce had in chambers since the 27th day of April, 1900, and will involve the validity of every order, judgment and decree made by every circuit judge sitting in chambers since the last above mentioned date.

That the administration of justice in the Territory of Hawaii is now crippled and impaired pending a decision by this honorable court of the questions raised by said writ of prohibition, and that, in the opinion of affiant, public necessity urgently demands a speedy determination of said question.

Dated Honolulu, September 27th, 1904.

(S'g'd) J. ALFRED MAGOON.

Subscribed and sworn to before me this 27th day of September, 1904.

[SEAL.] (S'g'd) F. W. WUNDENBERG,
Notary Public, 1st Circuit.

(Endorsed and filed Sept. 27, 1904.)

59 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor. Prohibition.

Petition for Writ of Error from the Supreme Court of the United States.

To the Honorable Walter F. Frear, chief justice of the supreme court of the Territory of Hawaii:

Now comes Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, the above named petitioner, by his attorneys, Sidney M. Ballou, W. A. Kinney, Henry E. Cooper, A. G. M. Robertson, A. A. Wilder and Benjamin L. Marx, and complains and alleges that he is a citizen of the United States of America; that in the above entitled matter on the 7th day of November, A. D. 1904, a final judgment or decree was rendered against your petitioner by the supreme court of the Territory of Hawaii, that being the highest court of law or equity of the said Territory of Hawaii in which a decision in said suit could be had, wherein it was adjudged that the laws of the Territory of Hawaii conferring judicial power not incidental or ancillary to a cause pending in some court, upon circuit judges at chambers, and particularly sections 37 and 38 of chapter 57 of the Session Laws of the Territory of Hawaii for 1892, sections 1343 to 1395 of the Civil Code of 1859, act 16 of the Session
60 Laws of the Territory of Hawaii for 1903 and section 11 of act 32 of the Session Laws of the Territory of Hawaii for 1903 are not in conflict with section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30th, 1900, and also adjudged that the writ of prohibition therein prayed for should be denied, and the temporary writ heretofore issued should be dissolved, all of which will more fully in detail appear from the assignment of errors filed with this petition, whereby manifest errors were committed to the great prejudice and damage of your petitioner.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the Territory of Hawaii and the judges thereof to the end that the record in the said cause may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected, and said judgment reversed, and for the approval of the bond presented herewith as a supersedeas bond.

And your petitioner will ever pray.
Dated, Honolulu, November 8th, 1904.

ALFRED W. CARTER,
Guardian of the Property of Annie T. K. Parker, a Minor,
By his attorneys:

(S'g'd) SIDNEY M. BALLOU,
(S'g'd) WM. A. KINNEY,
(S'g'd) HENRY E. COOPER,
(S'g'd) A. G. M. ROBERTSON,
(S'g'd) A. A. WILDER,
(S'g'd) BENJAMIN L. MARX.

61 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,
vs.
Honorable GEORGE D. GEAR, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.
} Writ of Error.

Order Allowing Writ of Error from the Supreme Court of the United States.

The above entitled matter coming on to be heard upon the petition of the petitioner therein for a writ of error from the Supreme Court of the United States to the supreme court of the Territory of Hawaii, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, the writ of error to operate as a supersedeas, and that the bond for that purpose presented by said petitioner in the sum of $1000. be and the same is hereby approved.

Honolulu, T. H., November 8, 1904.
(S'g'd)
W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

(Endorsed:) Supreme court—Territory of Hawaii. Alfred W. Carter guardian etc.—plaintiff in error *vs.* Hon. Geo. D. Gear second judge etc. & John S. Low, next friend etc.—defendants in error. Petition for writ of error and order allowing writ—Filed November 8, 1904—Henry Smith, clerk.—Ballou & Marx—303 Stangenwald bldg.—Honolulu—attorneys for plaintiff in error.

62 In the Supreme Court of the United States.

ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,
vs.
Honorable GEORGE D. GEAR, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.
} Writ of Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable judges of the supreme court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of a final judgment or decree which is in the said supreme court of the Territory of Hawaii, before you, or some of you, being the highest court of law or equity of the said Territory in which a decision could be had in the suit entitled "In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor," where was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States and the decision was against their validity, or where was drawn in question the validity of a statute of or an authority exercised under said Territory of Hawaii, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of their validity, or where any title, right, privilege or immunity was claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision was against
63 the title, right, privilege or immunity specially set up or claimed by either parties under said Constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of the said Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof in the said Supreme Court, to be then and there held, that

the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller Chief Justice of the Supreme Court, the 8th day of November in the year of our Lord one thousand nine hundred and four.

[SEAL.] (S'g'd) HENRY SMITH,
Clerk of the Supreme Court, of the Territory of Hawaii.

(Endorsed:) In the United States Supreme Court.—Alfred W. Carter guardian etc., plaintiff in error *vs.* Hon. Geo. D. Gear, second judge etc. and John S. Low, next friend etc. defendants in error.—Writ of error.—Filed November 8, 1904.—Henry Smith, clerk. Ballou & Marx—303 Stangenwald bldg. Honolulu.—attorneys for plaintiff in error.

Allowed by
(S'g'd) W. F. FREAR,
Chief Justice Supreme Court Territory of Hawaii.

64 In the Supreme Court of the Territory of Hawaii.

ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,
vs.
Honorable GEORGE D. GEAR, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error. } Writ of Error.

Assignment of Errors.

Now comes Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, plaintiff in error in the above entitled cause, and respectfully submits:

That in the record, proceedings, decision and final judgment of the supreme court of the Territory of Hawaii in the cause entitled "In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the circuit court of the first circuit at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor," there is manifest error in this, to-wit:

First. That the court erred in holding that the statutes of the Territory of Hawaii purporting to confer upon the judges of the several circuit courts, at chambers, within their respective jurisdic-

tions, judicial power not incident or ancillary to some cause pending before a court are not in conflict with and in violation of the provisions of section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved
65 April 30th, 1900, and commonly known as "the organic act of the Territory of Hawaii."

Second. That the court erred in holding that the statutes of the Territory of Hawaii purporting to confer upon the judges of the several circuit courts, at chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court were not repealed by said act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30th, 1900, and commonly known as "the organic act of the Territory of Hawaii.";

Third. That the court erred in holding that the provisions of sections 37 and 38 of chapter 57 of the Session Laws of the Territory of Hawaii for 1892; sections 1343 to 1395 of the Civil Code of 1859; act 16 of the Session Laws of the Territory of Hawaii for 1903; and sections 11 and 12 of act 32 of the Session Laws of the Territory of Hawaii for 1903, and each of said sections and acts are not in conflict with and in violation of the provisions of section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30th, 1900, and commonly known as "the organic act of the Territory of Hawaii,";

Fourth. That the court erred in holding that the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, had jurisdiction of the proceedings to remove Alfred W. Carter as guardian of the property of Annie T. K. Parker, a minor;

Fifth. That the court erred in ordering judgment to be entered and in entering judgment denying a permanent writ of prohibition and dissolving the temporary writ issued herein on the 7th day of September, A. D. 1904;

66 Wherefore and on account of said manifest errors and each of them, said Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, prays that the judgment of the said supreme court of the Territory of Hawaii in said cause be reversed, and that said supreme court of the Territory of Hawaii be ordered to enter and order making the writ of prohibition heretofore issued in said cause perpetual.

Dated, Honolulu November 8th, 1904.

(S'g'd) SIDNEY M. BALLOU,
(S'g'd) WM. A. KINNEY,
(S'g'd) HENRY E. COOPER,
(S'g'd) A. G. M. ROBERTSON,
(S'g'd) A. A. WILDER,
(S'g'd) BENJAMIN L. MARX,
Attorneys for Plaintiff in Error.

(Endorsed:) Supreme court, Territory of Hawaii.—Alfred W. Carter, guardian, etc. plaintiff in error *vs.* Hon. Geo. D. Gear, second judge etc. and John S. Low, next friend etc.—defendants in error.—Assignment of errors.—Filed November 8, 1904.—Henry Smith, clerk.—Ballou & Marx—303 Stangenwald bldg. Honolulu—attorneys for plaintiff in error.

67 The Supreme Court of the United States.

($1. stamp.)

ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,
vs.
Honorable GEORGE D. GEAR, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.
} Writ of Error

Bond on Writ of Error.

Know all men by these presents that I, Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, as principal and the Pacific Surety Company, a corporation organized and existing under the laws of the State of California, as surety, are held and firmly bound unto the Honorable George D. Gear, second judge of the circuit court of the first circuit, Territory of Hawaii, at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor, in the sum of one thousand dollars ($1,000.00), to be paid to the said obligees, their successors, representatives and assigns; to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

The condition of this obligation is such, that

Whereas the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment or decree rendered on the 7th day of November, 1904, by the supreme court of the Territory of Hawaii in an
68 action entitled: "In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor;"

Now therefore the condition of this obligation is such that if the above named plaintiff in error shall prosecute the said writ of error to effect and answer all costs and damages if he shall fail to make

good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof the said principal has set his hand and seal, and the said surety has caused its corporate name to be signed and its corporate seal to be affixed by its attorney-in-fact thereunto duly authorized, this 8th day of November, 1904.

(S'g'd) ALFRED W. CARTER,
Guardian of the Property of Annie T. K. Parker, a Minor.
PACIFIC SURETY COMPANY,
(S'g'd) By ZENO K. MYERS, [SEAL.]
Attorney-in-Fact.

I hereby approve the foregoing bond and surety this 8th day of November, A. D. 1904.

(S'g'd) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

(Endorsed:) Supreme court Territory of Hawaii.—Alfred W. Carter, guardian etc. plaintiff in error *vs.* Hon. Geo. D. Gear, second judge etc. & John S. Low, next friend etc. defendants in error.—Bond on writ of error.—Filed November 8, 1904—Henry Smith, clerk—Ballou & Marx—303 Stangenwald bldg. Honolulu—attorneys for plaintiff in error.

69 The Supreme Court of the United States.

ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error,
vs.
Honorable GEORGE D. GEAR, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.
} Writ of Error.

Citation to Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

To the Honorable George D. Gear, second judge of the circuit court of the first circuit, Territory of Hawaii, at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Hawaii, wherein Al-

fred W. Carter, guardian of the property of Annie T. K. Parker, a minor, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness Honorable W. F. Frear, chief justice of the supreme court of the Territory of Hawaii, this 8th day of November, A. D. 1904.

(S'g'd) W. F. FREAR,
Chief Justice Supreme Court, Territory of Hawaii.

70 Copy of the within citation received this 8th day of November, A. D. 1904.

(S'g'd) J. ALFRED MAGOON,
J. LIGHTFOOT,
Attorneys for Defendants in Error.

(Endorsed:) In the United States Supreme Court.—Alfred W. Carter, guardian etc. plaintiff in error *vs.* Hon. Geo. D. Gear, second judge etc. and John S. Low, next friend. Defendants in error.—Citation to defendants in error.—Filed November 8, 1904.—Henry Smith, clerk—Ballou & Marx—303 Stangenwald bldg.—attorneys for plaintiff in error.

71 In the Supreme Court of the Territory of Hawaii.

In the Matter of the Application of ALFRED W. CARTER, Guardian of the Property of Annie T. K. Parker, a Minor, for a Writ of Prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at Chambers, and J. S. Low, Next Friend of Annie T. K. Parker, a Minor.

Certificate of Clerk to Transcript.

TERRITORY OF HAWAII, } ss:
Honolulu, Oahu, }

I, Henry Smith, clerk of the supreme court of the Territory of Hawaii, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 58 inclusive, contain a true and complete transcript of the record and proceedings had in the above entitled court in the case entitled "In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the circuit court of the first circuit, at chambers and J. S. Low, next friend of Annie T. K. Parker, a minor," as the same remain of record and on file in my office.

I further certify that the foregoing pages numbered from 59 to 70 inclusive contain true and correct copies of the "petition for writ of error and order allowing writ and approving bond," "writ of error," "assignment of errors," "bond on writ of error" and "citation to defendants in error."

In testimony whereof I have caused the seal of said supreme court of the Territory of Hawaii to be hereunto affixed at Honolulu in said Territory, this 8th day of November, A. D. 1904.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

[Endorsed:] Number 5993. Law division. Supreme court. *In re* application of A. W. Carter, guardian of the property of A. T. K. Parker, a minor, for a writ of prohibition against Hon. George D. Gear, second judge of the circuit court of the first circuit and John S. Low, next friend of Annie T. K. Parker, a minor. Certified transcript of record. Entered in docket vol. —, page —. Record vol. —, page —. —— ——, clerk.

Endorsed on cover: File No. 19,542. Territory of Hawaii supreme court. Term No. 442. Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, plaintiff in error, *vs.* George D. Gear, second judge of the circuit court of the first circuit, Territory of Hawaii, *et al.* Filed November 28", 1904. File No. 19,542.